

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD**FIRST APPEAL No. 2150 of 1983****For Approval and Signature:****HONOURABLE MR.JUSTICE AKSHAY H.MEHTA**

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1 Whether Reporters of Local Papers may be allowed
to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy
of the judgment ?

4 Whether this case involves a substantial question
of law as to the interpretation of the
constitution of India, 1950 or any order made
thereunder ?

5 Whether it is to be circulated to the civil judge
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UNITED INDIA INSURANCE CO LTD - Appellant(s)**Versus****LALJIBHAI HAMIRBHAI & 2 - Defendant(s)**

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Appearance :

MR AP MEDH for Appellant(s) : 1,
MR PR JANI for Defendant(s) : 1,
NOTICE SERVED for Defendant(s) : 2,
MS MAYA DESAI for MR MD PANDYA for Defendant(s) : 3,

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CORAM : HONOURABLE MR.JUSTICE AKSHAY H.MEHTA**Date : 20/11/2006****ORAL JUDGMENT**

1. The United India Insurance Co. Ltd., has filed this appeal under Section 110-D of the Motor Vehicles Act [hereinafter referred to as the "Act"], against the

judgment and award made by MACT [Main], Ahmedabad. Rural at Narol in MAC Application No. 520 of 1981 dated 16th April, 1983. In this appeal the appellant has challenged the finding given by the Tribunal that the driver of the vehicle insured with the appellant was 100% negligent while driving his vehicle and as a result of the same, he caused accident in question. The Tribunal has therefore held the insured as well as the appellant vicariously liable to satisfy the entire award.

2. Respondent no. 1, who is hereinafter referred to as the claimant, filed MAC Application No. 520 of 1981 to recover the compensation of Rs.50,000=00 for the bodily injury and consequential disability suffered by him. According to the claimant, on 30th July, 1980 he was serving as a cleaner and was attached to truck bearing registration No. GTB 6977. On that day, around 2:30 to 4:45 p.m., the truck was travelling on Ahmedabad Bhavnagar highway. When it reached near village Changodara, one bus belonging to respondent no. 3 - GSRTC was proceeding ahead in the same direction. It is alleged by the claimant that the truck was driven by the driver of opponent no. 1 with excessive speed and in rash and negligent manner. As a result of such driving, the truck dashed against the rear side of the bus and due to the

impact, the claimant sustained serious injuries including fracture of the femur bone. He was removed to the hospital for treatment. It is the say of the claimant that he had to undergo operation and thereafter the injured limb remained in plaster cast for long period. It was averred that in spite of the expensive and treatment of long duration, he could not be fully cured and he suffered permanent disability, which rendered him totally unfit for working as truck cleaner. According to him, on the date of the accident, his salary was Rs.250=00 per month, over and above the different allowances received by him. On the basis of the same, he claimed Rs.50,000=00.

3. The application was resisted by the appellant namely the insurer of the truck by filing written statement at Exh. 7. It was denied that the claimant was working as cleaner of the offending truck. It was contended that he was gratuitous passenger travelling in the vehicle without the permission and knowledge of respondent no. 2 i.e., the owner of the truck. According to the appellant since there was breach of condition of the policy, it was not liable to pay any compensation to the claimant. It was contended that the bus was proceeding ahead of the truck with excessive speed and

all of a sudden the driver of the bus applied breaks without giving any signal for cautioning the vehicles following it. Because of such rash act, the collision took place. In other words, the appellant tried to throw blame on the driver of the S.T. Bus. In the alternative it was also averred that if the driver of the truck was held liable for causing accident, the liability of the appellant could be only to the extent it arose under the Workman's Compensation Act.

4. The GSRTC filed written statement at Exh. 4. It is averred saying that the driver of the bus drove the vehicle on the correct side with moderate speed. However, a herd of buffaloes abruptly came in front of the bus and he suddenly applied the breaks. While he was about to re-start the bus, the truck dashed with it from behind. Thus, respondent no. 2 - GSRTC tried to throw blame on the driver of the truck.

5. The parties led evidence in support of their cases. On the basis of the material produced before it, the Claims Tribunal decided the issue with regard to negligence and held the driver of the truck fully responsible for causing the accident. The Tribunal also assessed the compensation which the claimant deserved to

receive and in the opinion of the Tribunal, the claimant was entitled to receive compensation of Rs.37,600=00 and directed that the owner and the insurer of the truck i.e. Respondent no. 2 and the appellant to satisfy the award jointly and severally, the judgment and award dated 16th April, 1983. In this appeal the challenge is to the finding given by the Claims Tribunal holding the driver of the truck solely responsible for causing the accident. According to the appellant, the driver of the bus also contributed to the accident. Mr. A.P. Medh learned advocate for the appellant submitted that the Claims Tribunal has committed error in adjudging the driver of the truck 100% negligent. He submitted that before the Tribunal, the judgment delivered in MAC Application No. 48 of 1981 by MACT-III [Spl.] Ahmedabad Rural at Narol, dated 22nd December, 1981 was produced at Exh. 27. The said proceedings also arose on account of the accident in question. In the said proceedings, which was filed by a passenger travelling in the S.T. Bus, the Tribunal gave a finding that the driver of the S.T. Bus was negligent to the extent of 30%, whereas the driver of the truck was negligent to the extent of 70%. In the said proceedings, the present appellant as well as respondent no. 2 were joined as opponents. According to Mr. Medh the said finding operated as res-judicata and the Tribunal was not

justified in giving different finding. In support of his contentions, he has placed reliance on several judicial decisions. Mr. Medh also submitted that while computing the income of the claimant, the Tribunal has erroneously taken into consideration the illegal income which the claimant generated by having unauthorized passengers in the truck. As against that Ms. Maya Desai learned advocate for respondent no. 2 submitted that the evidence on record of the present proceedings clearly showed that the sole negligence was that of the driver of the truck and, therefore, the Tribunal rightly held him 100% liable for causing the accident. She also submitted that the appellant had not taken any plea with regard to bar of res judicata in the written statement. She also submitted that in the earlier proceedings the contesting parties were claimant of that case and the appellant as also respondent no. 2 and, therefore, the bar of res-judicata did not operate. She lastly submitted that the judgment at Exh. 27 is based on misreading of the facts and, therefore, the Tribunal was justified in the present case to arrive at an independent conclusion on the basis of the material produced before it on the aspect of negligence. No other submissions have been advanced by both the learned advocates.

6. The limited question, therefore, arises before this Court for consideration is whether the Tribunal could have taken different view on the issue of negligence than the one taken in former proceedings since the bar of res-judicata operated. So far the eligibility of the claimant to receive compensation and the quantum of compensation are concerned, no dispute has been raised by the learned advocates. I have, therefore, concentrated on the sole controversy whether principle of res-judicate could be applied in the present case. Section 11 of the Civil Procedure Code deals with res-judicata. It is as under :-

Section 11 : Res-judicata - No Court shall try any suit or lease in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a Court competent to try such subsequent suit or the suit in which the issue has been subsequently raised, and has been heard and finally decided by such Court.

7. It is, therefore, contended by Mr. Medh that the issue with regard to negligence was directly and substantially in issue in the former proceedings, namely MAC Application No. 48 of 1981 between the same parties and that issue was heard and finally decided by the Tribunal. Hence, the Tribunal in subsequent proceedings involving the same issue between the same parties could

not have decided it since bar res-judicata operated. It may be seen here that in the earlier proceedings which were filed by Amratlal Devchandbhai against five respondents for claiming compensation of Rs.25,000=00, Opponent no. 2 of the said proceedings was, owner of the offending truck who is also opponent no. 1 in the present proceedings. Opponent no. 3 of the said case is the appellant in the present appeal i.e. the insurance company of the truck, against whom notice under Section 96 (2) of the Act was taken out, during the course of hearing, as the insurer of opponent no. 1 namely Amin Transport Company. Thus, both i.e., the appellant and the insured were opponents in the earlier proceedings, as also respondent no. 2 i.e., GSRTC. The issue of negligence was raised in MAC Application No. 48 of 1981. The Claims Tribunal decided that the case of the claimant of that case and the bodily injury received by him were on account of rash and negligent driving of the both the vehicles namely S.T. Bus bearing registration No. GRT 6988 and the truck bearing registration No. GTB 6977. It held that so far as the truck driver was concerned, the negligence was 70% while negligence of the S.T., driver was 30%. Thus, on the basis of the material produced before it, the Tribunal gave the aforesaid finding. In the subsequent proceedings namely, MAC Application No. 520 of 1981 same issue was raised and the contesting parties on the said issue happened to be the same i.e.,

the insured and the insurer of the truck and the GSRTC. In the subsequent proceedings also, they are the opponents as already stated above. The contention of Ms. Desai is that the claimants in both the cases were different and, therefore, provisions of Section 11 of the Civil Procedure Code did not apply in this case. However, according to Mr. Medh Section 11 of the Civil Procedure Code can come into play even when there are two contesting defendants, who are common in both the cases. In view of these submissions, it will now be necessary for me to refer to the decisions cited and relied on by Mr. Medh.

8. The Privy Council in its decision rendered in the case of **Syed, Mohamamd Saadat Ali Khan v. Mirza Wiquar Ali Beg & Ors., reported in A.I.R. (30) 1943** Privy Council at pg. 115 has observed as under :-

"In order that a decision should operate as res judicata between co-defendants three conditions must exist : (1) There must be a conflict of interest between those co-defendants , (2) it must be necessary to decide the conflict in order to give the plaintiff the relief he claims, and (3) the question between the co-defendants must have been finally decided."

9. Thus, the Privy Council has laid down that if the aforesaid three conditions stand satisfied, res-judicata can operate between the co-defendants also. In the present case these conditions are adequately

satisfied. The co-opponents are common, the issue of negligence is decided finally and unless that issue was decided no relief could have been given to the claimant. In view of this decision, the submissions of Ms. Desai cannot be accepted.

9.1. In the case of **Iftikhar Ahmed & Ors v. Syed Meharban Ali & Ors.**, reported in (1974) 2 SCC pg. 151, the Apex Court has held as under :-

"13. Now it is settled by a large number of decisions that for a judgment to operate as *res judicata* between or among co-defendants, it is necessary to establish that (1) there was a conflict of interest between co-defendants; (2) that it was necessary to decide the conflict in order to give the relief which the plaintiff claimed in the suit; and (3) that the Court actually decided the question."

9.2. In the instant case therefore, it is very clear that there was conflict of interest between the appellants and respondent no. 2 of the present case and that conflict was needed to be decided to give the relief claimed by the claimant and the question of negligence was actually decided by the Tribunal.

9.3. Same view has been taken by the Apex Court in the case of **Mahboob Sahab v. Syed Ismail & Ors.**, reported [1995] SCC pg. 693.

10. Mr. Medh also placed reliance on the decision of the Apex Court in the case of the **State of Punjab v. Bua Das Kaushal** reported in **AIR 1971 SC pg.1676**. This decision has been cited by him to meet the submissions of Ms. Desai that the appellant has not specifically pleaded in the written statement the contention with regard to res-judicata. In the aforesaid case, the Apex Court has laid down the principle that even if no specific plea has been raised, if it appeared that the necessary facts were present in the minds of the parties and were also gone into by the Court, provisions of Section 11 of the Civil Procedure Code be applied in a proper case. It may be noted here that the written statement was filed by the appellant on 15th December, 1981 and the judgment that was delivered by the Tribunal in MAC Application No. 48 of 1981 was on 22nd December, 1981. It is true that the appellant could have amended the written statement in view of the subsequent development, however, the judgment was immediately produced on record by the appellant and it was taken in evidence and exhibited at Exh. 27. Therefore, it can safely be said that these facts were on the minds of the parties, in particular, the contesting opponents and the same was looked into by the Court since it was taken in evidence and exhibited. Therefore, there was no reason for the appellant to raise any specific plea with regard to bar of res-judicata and that plea was presumed to have been raised by the appellant.

11. Ms. Desai has submitted that the decision rendered by the Tribunal in MAC Application No. 48 of 1981 was a decision merely given on the basis of the affidavits filed by the parties, since the claim in the said case was Rs.25,000=00. Therefore, according to her, the issue with regard to negligence could not be said to be directly and substantially in issue in the said proceedings. This submission of Ms. Desai cannot be accepted. Though the proceedings were decided on the affidavits i.e., in summary way, as the claim of was Rs.25,000=00, nevertheless it is a procedure prescribed under the Act, which was duly followed by the Tribunal. The parties raised this controversy effectively, and the same was also effectively dealt with by the Tribunal as can be seen from the judgment. The issue has been decided after lengthy discussion of the evidence and by giving anxious consideration to various aspects on this count. Therefore, it can never be said that the said finding was given by the Tribunal in a cursory manner. In the decision rendered by the Apex Court in the case of **Vijayabai & Ors., v. Shriram Tukaram & Ors., reported in AIR 1999, (Vol. 86) SC at pg.431**, has held as under:-

"14. It would be impermissible to permit any party to raise any issue *inter-se* where such an issue under the very Act has been decided in an

early proceeding. Even if res judicata in its strict sense may not apply but its principle would be applicable. Parties who are disputing now, if they were parties in an early proceeding under this very Act raising the same issue would be stopped from raising such an issue both on the principle of estoppel and constructive res-judicata. The finding recorded even by the High Court that possession of the landlord could only be by an order under Section 36 (2) is also not sustainable as that only conceived of the case where tenant is dispossessed and landlord is seeking to get back possession of the suit land from such tenant. In the present case, there was no such question. For this respondent no. 1 has to be at least a tenant and whether he is a tenant stood concluded, as aforesaid earlier, hence initiation of proceeding under Section 49B cannot be sustained law.

12. The Apex Court has gone to the extent of observing that even if the principle of res-judicata may not apply in its strict sense, but its principle would certainly be applicable. When the parties who are disputing in subsequent proceedings, are also parties in earlier proceedings under the very Act, the principle of estoppel and rule of constructive res-judicata will come into play, according to the Apex Court.

13. In the decision rendered in the case of **State of Uttar Pradesh v. Nawab Hussain, reported in AIR 1977 SC pg. 1680**, the Apex Court has said that the rule of constructive res-judicata is in reality aspect or amplification of the general principle. While explaining the principle of rule of constructive res-judicata it has

said as under:-

"This is, therefore, another and an equally necessary and efficacious aspect of the same principle, for it helps in raising the bar of res-judicata by suitably construing the general principle of subduing a cantankerous litigant. That is why this other rule has sometimes been referred to as constrictive res-judicata which in reality, is an aspect or amplification of the general principle."

14. In the decision of the Apex Court rendered in the case of **Satyadhyan Ghosal & Ors. v. Smt. Deorajin Debi & Anr.**, reported in **AIR 1960 SC 941**, the Apex Court has elaborately explained the need of giving finality to judicial decisions and has held that the principle of res-judicata is based on such need. It has held as under:

"7. The principle of res judicata is based on the need of giving a finality to judicial decisions. What it says is that once a res is judicata, it shall not be adjudged again. Primarily it applies as between past litigation and future litigation. When a matter, whether on a question of fact or a question of law has been decided between two parties in one suit or proceeding and the decision is final, either because no appeal was taken to a higher court or because the appeal was dismissed, or no appeal lies, neither party will be allowed in a future suit or proceeding between the same parties to canvass the matter again. The principle of res judicata is embodied in relation to suits in Section 11 of the Civil Procedure Code; but even Section 11 does not apply, the principle of res judicata has been applied by courts for the purpose of achieving finality in litigation. The result of this is that the original Court as well as any higher court must in any future litigation proceed on the basis that the previous decision was correct.

8. The principle of res judicata applies also as between two stages in the same litigation to this extent that a Court, whether the trial Court or a higher court having at an earlier stage decided a matter in one way will not allow the parties to re-agitate the matter again, at a subsequent stage of the same proceedings. Does this however, mean that because at an earlier stage of the litigation a Court has decided an interlocutory matter in one way and no appeal has been taken therefrom or no appeal did lie, a higher Court cannot at a later stage of the same litigation consider the matter again."

15. Ms. Desai contended that the parties in the earlier proceedings and the subsequent proceedings are not the same. In other words, according to her, the claimant in MAC Application No. 48 of 1981 was the passenger in the Bus, whereas in MAC Application No. 521 of 1981, the claimant was the cleaner of the truck. She, therefore, submitted that Section 11 of Civil Procedure Code will not come into operation. This submission of Ms. Desai also cannot be accepted. Merely because the applicant in both the cases were different, it does not mean that the bar of res-judicata cannot operate since the controversy was between the two defendants who were parties to both the proceedings and that controversy was required to be decided to give relief to the applicants of both the cases. In the case of **Ishwardas v. The State of Madhya Pradesh & Ors.**, reported in **AIR 1979 SC. pg.551**, the Apex Court has held that in order to sustain the plea of res-judicata it is not necessary that all the parties to the litigations must be common. All that is

necessary is that the issue should be between the same parties or between the parties under whom they or any of them claimed. This decision also takes care of second limb of the submission of Ms. Desai that the material that was produced in earlier case was not before the Tribunal in the subsequent case. The Apex Court has further said that once the questions at issue in the two suits are found to be the same, the fact that the material which led to the decision in the earlier suit was not again placed before the Court in the second suit, cannot make the slightest difference. The plea of res-judicata may be sustained without anything more, if the question at issue and the parties are the same, subject of course to the other conditions prescribed by Section 11 of Civil Procedure Code.

16. Last submission of Ms. Desai is that the Tribunal in earlier case has decided the issue of negligence on misreading of the facts. However, on perusal of the said judgment, it appears that the issue has been substantially considered by the Tribunal. An insignificant erroneous statement made at one place by the Tribunal will not render the elaborate discussion and appreciation of evidence meaningless. Apart from that the Courts have gone to the extent that even if the conclusion drawn by the Court in earlier case is erroneous, the plea of res-judicata can be entertained

and the bar can be applied in subsequent proceedings.

17. Before the Apex Court in the case of **Sobhag Singh & Ors. v. Jai Singh & Ors.**, reported in AIR 1968 SC pg. 1328, it was contended that the order passed by the High Court was interlocutory order remanding the proceedings to the Board of Revenue and on that count the decision of the High Court would not operate as res-judicata either before the Board of Revenue or before this Court. The Apex Court has thereafter held as under:-

"We are unable to accept that contention. Against the order of the Board of Revenue rejecting the claim of Jai Singh to be recognized as the adopted son of Sabhal Singh, a writ petition was moved in the High Court and a prayer for quashing that order was made. The High Court dealt with the dispute on merits and held that the order of the Board of Revenue holding that because of the Matmi Rules the adoption of Jai Singh by Sabhal Singh without the previous sanction of the Ruler could not be recognized for the purpose of determining the succession to the Jagir was erroneous. The High Court did in making the final order direct the Tribunal to decide the case in accordance with the law and in the light of the observations made in the judgment, but the direction was, in our judgment, a surplusage. The High Court issued a writ in the nature of certiorari quashing the order of the Tribunal. It was unnecessary thereafter to direct or advise the Board of Revenue to perform its statutory duty to decide the dispute according to law. The Board of Revenue had to decide the dispute in accordance with the law declared by the High Court. All questions which had been expressly decided by the High Court on contest between the parties and other questions which must be deemed by necessary implication to have been decided were res-judicata and could not be reopened before the Board of Revenue. In this appeal it

is, therefore, not open to the appellant to contend that the decision of the High Court on the questions decided in the writ petition was erroneous."

18. The Tribunal in the present case has referred to Exh. 27 in paragraph 15 of its judgment, but it has not entertained the plea of res-judicata since in its opinion the parties have neither raised nor pleaded, the bar of res judicata and, therefore, the Tribunal has to decide the issue on the evidence before it. This reasoning of the Tribunal does not appear to be proper as already discussed above. Even if the plea is not specifically raised, the adequate material has been placed before the Tribunal by the appellant making its intention explicit. If that be so, the question of res judicata ought to have been examined by the Tribunal and appropriate finding ought to have been given on that issue. That has not been done. Nevertheless, I have gone through the judgment rendered in MAC Application No. 48 of 1981 by the Tribunal and in the said decision the Tribunal has referred the evidence of various persons connected with this case, which is in the form of affidavits. It has also referred the panchnama of the incident. The Tribunal has given categorical finding on the basis of the material that the truck driver ought to have maintained safe distance between the two vehicles and the distance of 8 to 10 feet could not be called safe

distance. But again in paragraph 25, the issue of negligence has been discussed by the Tribunal and thereafter it has come to the conclusion that negligence of truck driver was 70%, whereas that of ST driver was 30%. In view of the same, by no stretch of imagination, it can be said that the finding given by the Tribunal in earlier case is not significant and it cannot operate as bar of res-judicata in subsequent proceedings. In view of the same, the contentions raised by Mr. Medh are upheld.

19. The submission of Mr. Medh with regard to quantum of compensation awarded by the Tribunal deserves acceptance. It was not proper on the part of the Tribunal to have considered the income which was generated by respondent no. 1 by unauthorized and illegal means for computing loss of income. But considering the fact that the man is an illiterate and this a very old case, there is no need for me to disturb that finding of the Tribunal.

20. In view of the aforesaid, the finding given by the Tribunal regarding 100% negligence of the driver of the truck is modified and now it is held that the negligence of the truck driver was to the extent of 70% and that of the driver of the S.T. Bus was to the extent of 30%.

21. The appeal is partly allowed with no order as to costs.

R & P to be re-transmitted to the Tribunal forthwith.

[Akshay H. Mehta, J.]

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